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Henry Mascia

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# COMMENTS

## A RECONSIDERATION OF HAITIAN CLAIMS FOR WITHHOLDING OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

Henry Mascia

### I. INTRODUCTION

As they brought Jacque<sup>1</sup> to the National Penitentiary in Port-au-Prince, his stomach dropped, and his heart skipped a beat. After spending only two days in the prison, he discovered that the conditions were worse than he had thought. They had forced him to stay in this 25' by 15' by 15' cell with forty other men. Because there were no toilets, he had to defecate in a bag and dump it out of the window. He got no sleep the first night because the wind blew the stench of fecal matter into his cell causing him to throw up the paltry portion of rice and beans they had given him the day before. During the moments when his body adjusted to the stench, he began to doze off, but the bites from rats, with whom he also shared this cell, disturbed even these short moments of rest. The next day, they served him only one meal of rice and beans again. Jacque became overwhelmed at the thought of spending even another minute this way. His lawyer told him that the Haitian authorities would release him if a member of Jacque's immediate family in Haiti agreed to take responsibility for him. Although he was born in Haiti, he came to the United States with his entire family when he was just a boy; so, there was nobody to sponsor him.

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<sup>1</sup> Jacque is a fictional character, but his experience is based on the actual conditions in the National Penitentiary in Port-au-Prince, where criminal deportees from the United States are held indefinitely.

Jacque could not take it anymore. He had to ask the guards for more food; otherwise, he would die of hunger. The other deportees warned him not to complain, but desperation clouded his judgment. The guards assumed that, as a criminal deportee from the United States, Jacque was just trying to start trouble and decided to teach him a lesson. They brought him out of the cell and struck him repeatedly with a metal rod. As the blows reigned down on his back, he could not help recalling the words of his lawyers: "I am sorry Jacque. The judges ruled that the conditions in the Haitian prisons do not constitute torture." If this is not "torture," he wondered, then what is?

Some immigrants in removal proceedings are eligible for Withholding of Removal under the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment ("Convention against Torture").<sup>2</sup> The United States signed the Convention against Torture on April 18, 1988.<sup>3</sup> On October 21, 1994, the Senate ratified the treaty,<sup>4</sup> conditioning its advice and consent on one declaration, two reservations, and five understandings.<sup>5</sup> These understandings were incorporated into the implementing regulations, which became effective on March 22, 1999.<sup>6</sup> The implementing regulations provide that the removal of an individual will be withheld if the applicant demonstrates that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."<sup>7</sup> The regulations define torture as:

[a]ny act by which severe pain or suffering, whether physical or mental, is *intentionally inflicted* on a person for such purposes as obtaining from him or her or a third person information or a con-

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<sup>2</sup> Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture, 8 C.F.R. § 208.16(c)(2) (2006).

<sup>3</sup> Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, pmbl., Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> [hereinafter Convention against Torture].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507).

<sup>7</sup> 8 C.F.R. § 208.16(c)(2).

fession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>8</sup>

The regulations also state that “[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.”<sup>9</sup>

U.S. Courts have interpreted the definition of torture to contain five elements:

(1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions.<sup>10</sup>

Courts have interpreted the requirement that a given act must be “intentionally inflicted” to constitute torture in a variety of ways. Nevertheless, the predominant interpretation is that the regulations create a specific intent requirement.<sup>11</sup>

The critical issue in many petitions for withholding of removal under the Convention against Torture is whether the treatment that the immigrant will suffer amounts to the statutory definition of torture.<sup>12</sup> Courts have been reluctant to extend this form of relief to criminal deportees, like Jacque, who are in danger of being detained indefinitely in Haitian prisons.<sup>13</sup>

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<sup>8</sup> 8 C.F.R. § 208.18(a)(1) (emphasis added).

<sup>9</sup> 8 C.F.R. § 208.18(a)(5).

<sup>10</sup> *In re J-E-*, 23 I. & N. Dec. 291, 297 (BIA 2002).

<sup>11</sup> See *Francois v. Gonzales*, 448 F.3d 645, 651 (3d Cir. 2006) (relying on *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005)); *Auguste v. Ridge*, 395 F.3d 123, 148 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173, 1191 (11th Cir. 2004); *In re J-E-*, 23 I. & N. Dec. 291, 301 (BIA 2002).

<sup>12</sup> See generally, e.g., *Auguste*, 395 F.3d at 123; *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003); *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198 (D. Conn. 2005); *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

<sup>13</sup> See generally, e.g., *Toussaint v. Attorney General*, 455 F.3d 409 (3d Cir. 2006); *Francois*, 448 F.3d 645; *Auguste*, 395 F.3d 123; *Thelemaque*, 363 F. Supp. 2d 198.

This Comment sets forth three major contentions. First, a general intent should satisfy the “intentionally inflicted” requirement of 8 C.F.R. § 208.18. Second, the analytical framework courts have used is flawed because it does not accurately reflect the concept of specific intent as it is understood in the criminal context. Third, Haitian authorities specifically intend to inflict severe pain and suffering on criminal deportees as a result of the widespread fear of and prejudice against them. Therefore, the conditions in Haitian prisons satisfy the regulatory definition of “torture.”

The second Part of this Comment will recount the history of non-refoulement as a doctrine. The third Part of this Comment will review the history of the Convention against Torture. The fourth Part of this Comment will discuss the statutory and regulatory implementation of the Convention against Torture. The fifth Part of this Comment will examine how U.S. courts and administrative agencies have interpreted the “intentionally inflicted” requirement. The sixth and final Part of this Comment will argue that general intent should be enough to satisfy the requisite intent element for Withholding of Removal under the Convention against Torture, set forth a new analytical framework using the specific intent standard, and, finally, demonstrate how the specific intent doctrine has been misapplied to prison conditions in Haiti.

## II. BACKGROUND ON REFUGEES AND REFOULEMENT

### A. *Beginnings of “non-refoulement”*

The term “non-refoulement” is derived from the French word “refouler” meaning “to drive back.”<sup>14</sup> Before the early to mid-nineteenth century, “formal agreements between states for the reciprocal surrender of subversives, dissidents, and traitors” controlled a state’s policy toward refugees.<sup>15</sup> However, popular support grew for those “fleeing their own country for political reasons.”<sup>16</sup> In 1933, Article 3 of the 1933 Convention Relating to the International Status of Refugees (the “1933 Convention”)

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<sup>14</sup> GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 69 (Oxford Clarendon Press 1996) (1983).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 70.

set forth the idea of non-refoulement for the first time.<sup>17</sup> The relevant portion of Article 3 reads:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.<sup>18</sup>

The 1933 Convention, while laying the ground work for refugee law today,<sup>19</sup> had a narrow scope, as it only applied to "Russian, Armenian and assimilated refugees"<sup>20</sup> and was only signed by eight States.<sup>21</sup> Future conventions and agreements would have a much wider scope.<sup>22</sup>

## B. 1951 Convention Relating to the Status of Refugees

### 1. Scope

The principle of non-refoulement set forth in Article 33 of the 1951 Convention Relating to the Status of Refugees (hereinafter "1951 Convention") has served "both as a model and a textual basis for many subsequent human rights treaties that have incorporated the principle of non-refoulement."<sup>23</sup> Article 33 reads:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

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<sup>17</sup> Convention relating to the International Status of Refugees, art. III, Oct. 18, 1933, 159 L.N.T.S. 199, 205 (entered into force July 26, 1935) [hereinafter 1933 Convention]; David Weissbrodt & Isabel Hörtreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 2 (1999).

<sup>18</sup> 1993 Convention, *supra* note 17, at 205.

<sup>19</sup> Weissbrodt & Hörtreiter, *supra* note 17, at 2.

<sup>20</sup> 1933 Convention, *supra* note 17, at 203.

<sup>21</sup> GOODWIN-GILL, *supra* note 14, at 71. Belgium, Bulgaria, Denmark, Egypt, France, Italy, Norway and Czechoslovakia were the only signatories. 1933 Convention, *supra* note 17, at 201, 203.

<sup>22</sup> See Conventions cited *infra* notes 24, 34.

<sup>23</sup> Weissbrodt & Hörtreiter, *supra* note 17, at 2.

2. The benefit of the present provision may not, however, be claimed by a refugee [sic] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>24</sup>

Article 33 of the Convention Relating to the Status of Refugees sets forth much broader protection than any other previous agreement.<sup>25</sup> Contrary to previous agreements, which were designed for specific humanitarian crises, this agreement applied generally to all those who fit the definition of a "refugee,"<sup>26</sup> defined as anyone who had:

[a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; [or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it].<sup>27</sup>

In addition, the 1951 Convention was much more widely accepted than previous agreements, as demonstrated by the fact that, as of 1999, one hundred and thirty-two states had signed onto the agreement.<sup>28</sup> Finally, the 1951 Convention applies not only to any refugees facing the threat of torture, but also to those who face the threat of persecution.<sup>29</sup> A person suffers persecution when "his life or freedom would be threatened."<sup>30</sup>

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<sup>24</sup> Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 176 U.N.T.S. 2545 (entered into force April 22, 1954) (official text in English and French) [hereinafter 1951 Convention].

<sup>25</sup> See Weissbrodt & Hörtreiter, *supra* note 17, at 18.

<sup>26</sup> *Id.*

<sup>27</sup> Weissbrodt & Hörtreiter, *supra* note 17, at 18 (quoting Convention Relating to the Status of Refugees, art. 1A, July 28, 1951, 189 U.N.T.S. 2545 (entered into force April 22, 1954) (official text in English and French)). The United States adopted a functionally equivalent definition of refugees in the Refugee Act of 1980. See 8 U.S.C.A. §1101(A)(42)(A) (WEST 2006).

<sup>28</sup> See Weissbrodt & Hörtreiter, *supra* note 17, at 18.

<sup>29</sup> See *id.*

<sup>30</sup> See 1933 Convention, *supra* note 18, art. 3; Weissbrodt & Hörtreiter, *supra* note 17, at 21.

## 2. *Exception*

Despite the expanded scope of protection that the 1951 Convention provided refugees against refoulement, a signatory could still return a refugee with a well-founded fear on account of a protected ground if the refugee “committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”<sup>31</sup> The 1951 Convention further provided that:

[t]he benefit of the present provision may not, however, be claimed by a refugee [sic] whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>32</sup>

These provisions reflect another principle of refoulement – a country need not put its own security in danger to accept a refugee. The principles of non-refoulement in the 1951 Convention<sup>33</sup> and the subsequent Protocol Relating to the Status of Refugees (1967) (“1967 Protocol”)<sup>34</sup> laid the foundation for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture” or “CAT”).<sup>35</sup>

## III. CONVENTION AGAINST TORTURE

### A. *History of the Convention*

The Convention against Torture was signed to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”<sup>36</sup> Adopted on December 10, 1984,<sup>37</sup> opened for signature on February 4, 1985,<sup>38</sup> and entered into force on June 26, 1987,<sup>39</sup> the

<sup>31</sup> 1951 Convention, *supra* note 24, art. 1F(b), at 156.

<sup>32</sup> 1951 Convention, *supra* note 24, art. 33(2), at 176.

<sup>33</sup> See 1951 Convention, *supra* note 24.

<sup>34</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter 1967 Protocol].

<sup>35</sup> See Convention against Torture, *supra* note 3; see also Weissbrodt & Hörterter, *supra* note 17, at 2.

<sup>36</sup> Convention against Torture, *supra* note 3, pmb.

<sup>37</sup> *Id.*

<sup>38</sup> *Zubeda v. Ashcroft*, 333 F.3d 463, 471 (3d Cir. 2003).



United States signed the Convention against Torture on April 18, 1988.<sup>40</sup> It was referred to the Senate Committee on Foreign Relations May 23, 1988,<sup>41</sup> and ratified by the Senate on October 27, 1990.<sup>42</sup> It became binding on the United States in 1994 when the President delivered the ratifying documents to the United Nations.<sup>43</sup> Today, one hundred and thirteen States are signatories to the Convention against Torture.<sup>44</sup>

### B. *Non-refoulement policy, Article 3*

The Convention against Torture is based principally on Article 5 of the Universal Declaration of Human Rights and Article 7 of the Covenant of Civil and Political Rights,<sup>45</sup> both of which are based on the fundamental principles of the 1975 Declaration against Torture.<sup>46</sup> However, the principle of non-refoulement in the Convention against Torture does not have an analogous provision in the 1975 Declaration against Torture.<sup>47</sup> Rather, the principles in the Convention against Torture have their roots in the case law of the European Convention against Human Rights.<sup>48</sup> The principle of non-refoulement under Article 3 of the Convention against Torture provides a much narrower scope of protection, as it protects only refugees in danger of being subjected to torture,<sup>49</sup> "one of the most severe forms of persecution."<sup>50</sup> The Convention against Torture defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any

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<sup>39</sup> Convention against Torture, *supra* note 3, pmbl.

<sup>40</sup> See *Zubeda*, 333 F.3d at 471.

<sup>41</sup> Convention against Torture, *supra* note 3, pmbl.

<sup>42</sup> 136 CONG. REC. S17, 486-501 (daily ed. Oct. 27, 1990).

<sup>43</sup> *Zubeda*, 333 F.3d at 471.

<sup>44</sup> Weissbrodt & Hörtreiter, *supra* note 17, at 6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Convention against Torture, *supra* note 3, art. 3.

<sup>50</sup> Weissbrodt & Hörtreiter, *supra* note 17, at 16.

kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>51</sup>

This narrow application is warranted because the Convention against Torture does not allow a state to return a refugee that could be a danger to society, as provided for in previous agreements with a broader scope of protection, such as the 1933 Agreement and the 1951 Agreement.<sup>52</sup>

### C. *Senate's advice and consent*

The U.S. Constitution gives the President the power to make treaties, with the advice and consent of the Senate.<sup>53</sup> On May 10, 1988, President Reagan referred the Convention against Torture to the Committee on Foreign Relations,<sup>54</sup> accompanied by a letter from the Department of State outlining the background of the Convention against Torture and recommending various conditions for the Senate to adopt.<sup>55</sup> President George H. W. Bush, concerned that President Reagan's package "faced substantial opposition from human rights groups and other interested parties," sent a revised package of conditions.<sup>56</sup> The Senate ratified the Convention against Torture,<sup>57</sup> and attached several reservations, understandings, declarations and provisos (collectively "Conditions") because "it was not possible to negotiate a treaty that was acceptable to the United States in all respects."<sup>58</sup>

For the purpose of this Comment's focus on non-refoulement, the most relevant Condition is the first understanding which states "[t]hat with reference to Article 1, the United States understands that, in order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental

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<sup>51</sup> Convention against Torture, *supra* note 3, art. 1.

<sup>52</sup> See *supra* Part II.B.2.

<sup>53</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>54</sup> Convention against Torture, *supra* note 3, pmbl.

<sup>55</sup> See *id.*

<sup>56</sup> REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. EXEC. DOC. NO. 30, at App. A (1990).

<sup>57</sup> See *supra* Part III.A.

<sup>58</sup> Convention against Torture, *supra* note 3, pmbl.

pain or suffering . . . .”<sup>59</sup> This understanding differs from the actual provision of Article 1 of the Convention against Torture, which provides that torture is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . .”<sup>60</sup> This understanding by the United States, despite President Bush’s efforts, drew criticism from some members of the international community. The Netherlands, in an objection dated February 26, 1996, stated, “[t]he Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention: II. 1 (a) This understanding appears to restrict the scope of the definition of torture under Article 1 of the Convention.”<sup>61</sup>

#### IV. INCORPORATION OF THE CONVENTION AGAINST TORTURE INTO U.S. LAW

##### A. *Statutory and Regulatory Implementation*

Because the Convention against Torture is not self-executing, according to the Senate’s final condition,<sup>62</sup> the United States passed various statutes and regulations to implement the provisions of the treaty, taking into account the Senate’s conditions.<sup>63</sup> On October 21, 1998, Congress passed the Foreign Affairs Reform and Restructuring Act, which ordered the heads of the appropriate agencies to prescribe regulations implementing Article 3 of the Convention against Torture.<sup>64</sup>

Accordingly, on February 19, 1999, the Immigration and Naturalization Service (INS), at the time a division of the Department of Justice (the Department of Homeland Security took over operations of the INS in 2002), set forth the interim rule

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<sup>59</sup> *Id.*, Declarations and Reservations of the U.S. (emphasis added).

<sup>60</sup> *Id.*, art. 1.

<sup>61</sup> *Id.*, Declarations and Reservations of the U.S.

<sup>62</sup> *Id.* The declaration reads, “The Senate’s advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of article 1 through 16 of the Convention are not self-executing.” *Id.*

<sup>63</sup> See *In re H-M-V*, 22 I. & N. Dec. 256 (BIA 1998) (holding that the Board of Immigration Appeals lacked jurisdiction to adjudicate a claim based on Article 3 of the Convention against Torture without a specific statute or regulation to implement the treaty).

<sup>64</sup> FOREIGN AFFAIRS REFORM AND RESTRUCTURING ACT OF 1998, 8 U.S.C.S. § 1231 (LEXISNEXIS 2006).

for the process by which an individual could seek relief under Article 3 of the Convention against Torture.<sup>65</sup> Subsequently, the interim rule was codified in the Code of Federal Regulations.<sup>66</sup> The regulations set forth two ways by which an applicant can be protected under Article 3 of the Convention against Torture: withholding of removal and deferral of removal.<sup>67</sup> An applicant qualifies for withholding or deferral of removal if the applicant demonstrates that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."<sup>68</sup> The Regulations define torture the same way that Article 3 of the Convention against Torture defines it.<sup>69</sup> However, the regulations add an additional provision not found in Article 3 of the Convention against Torture, which states that, "[i]n order to constitute torture, an act must be *specifically intended* to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture."<sup>70</sup>

While the United States incorporated the CAT's definition of torture into the implementing regulations,<sup>71</sup> the regulations add an additional qualification for the phrase "intentionally inflicted."<sup>72</sup> The definition states that for an act to be torture, it must be "specifically intended to inflict severe physical or mental pain or suffering."<sup>73</sup> This additional provision was added pursuant to the first condition of ratification set forth by the U.S. Senate.<sup>74</sup> At least one country, the Netherlands, expressed its concern over the condition, as it was perceived "to restrict the scope of the definition of torture under Article 1 of the Convention [against Torture]."<sup>75</sup>

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<sup>65</sup> Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, and 507).

<sup>66</sup> 8 C.F.R. § 208.16.

<sup>67</sup> 8 C.F.R. § 208.16(c)(4).

<sup>68</sup> 8 C.F.R. § 208.16(c)(2).

<sup>69</sup> Compare *supra* Part III.B., with 8 C.F.R. § 208.18(a)(1).

<sup>70</sup> 8 C.F.R. § 208.18(a)(5) (emphasis added).

<sup>71</sup> Compare *supra* Part III.B., with 8 C.F.R. § 208.18(a)(1).

<sup>72</sup> 8 C.F.R. § 208.18(a)(1).

<sup>73</sup> 8 C.F.R. § 208.18(a)(5).

<sup>74</sup> Convention against Torture, *supra* note 3, Declarations and Reservations of the U.S.

<sup>75</sup> *Id.*, Objections of the Netherlands.

## V. SPECIFIC INTENT ELEMENT FOR WITHHOLDING OF REMOVAL UNDER CAT

An applicant, such as Jacque, seeking relief under the Convention against Torture, need only show that it is more likely than not that he would be subjected to torture if returned to the proposed country of removal. One of the critical determinations for the court is whether the applicant will suffer persecution, as promulgated in the regulations.<sup>76</sup> The regulations set forth five elements that must be satisfied for persecution to rise to the level of torture.<sup>77</sup> The element at issue in this Comment provides that an act of torture must be "specifically intended."<sup>78</sup> As shown in the following section, the courts have had difficulty determining the meaning of "intent." In fact, courts are somewhat divided on the issue of whether "intent," for the purposes of relief under the Convention against Torture, requires general or specific intent.<sup>79</sup>

In cases where a government or group of individuals inflict severe persecution in response to a specific attribute of the applicant, such as race, nationality, or political opinion, the intent of the persecutors can be ascertained fairly easily. Thus, the question of general or specific intent does not arise. However, cases regarding deplorable prison conditions, where intent is not so easily inferred, magnify the importance of interpreting the "intent" element. Accordingly, many of the following cases illustrate the determination of whether deplorable prison conditions constitute the regulatory definition of torture.

### A. *Interpretations of the Board of Immigration Appeals*

#### 1. *Majority Opinion of In re J-E-*

The most influential case regarding the interpretation of the "specifically intended" element of torture was decided by the Board of Immigration Appeals (the "Board" or the "BIA") in *In*

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<sup>76</sup> 8 C.F.R. § 208.18(a)(1).

<sup>77</sup> *In re J-E-*, 23 I. & N. Dec. 291, 297 (BIA 2002).

<sup>78</sup> 8 C.F.R. § 208.18(a)(5).

<sup>79</sup> Compare *Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004), and *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003), with *Auguste v. Ridge*, 395 F.3d 123, 147 (3d Cir. 2005), and *Cadet v. Bulger*, 377 F.3d 1173, 1190 (11th Cir. 2004).

*re J-E*.<sup>80</sup> The Board, sitting *en banc*, heard a case in which a Haitian immigrant sought Withholding of Removal under the Convention against Torture ("CAT relief").<sup>81</sup> The immigrant argued that he would be subjected to torture in Haiti because criminal deportees, such as the Respondent, were known to be "detained indefinitely in prison facilities where prisoners are subjected to inhuman conditions and police mistreatment."<sup>82</sup> The critical question for the Board was whether indefinite detention, inhuman prison conditions, and police mistreatment fit within the regulatory definition of torture.<sup>83</sup> The definition of torture, according to the majority, included a specific intent requirement.<sup>84</sup> The Board supported this interpretation by citing the legislative history of the treaty.<sup>85</sup> The Board declared that the "ratification documents<sup>86</sup> make it clear that [the phrase *specifically intended*] is a 'specific intent' requirement, not a general intent requirement."<sup>87</sup> Therefore, a torturer must intend to bring about severe pain and suffering, not merely know that his deliberate actions will result in severe pain or suffering, for a given act to meet the statutory definition of torture.<sup>88</sup>

Applying this standard of intent, the Board analyzed the indefinite detention policy, inhumane prison conditions, and police mistreatment separately.<sup>89</sup> The Board concluded that none met the regulatory definition of torture. The Board reasoned that Haiti's detention policy was not specifically intended to bring about severe physical or mental pain or suffering.<sup>90</sup>

The Board stated, "Although Haitian authorities are intentionally detaining criminal deportees knowing that the detention facilities are substandard, there is no evidence that they

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<sup>80</sup> See *In re J-E*, 23 I. & N. Dec. at 297.

<sup>81</sup> See *id.* at 292-94.

<sup>82</sup> *Id.* at 299.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 298.

<sup>85</sup> See *id.* at 301.

<sup>86</sup> One of the ratification documents referred to by the Court states explicitly that "[b]ecause specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention." REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. EXEC. DOC. NO. 30, at 14 (1990).

<sup>87</sup> *In re J-E*, 23 I. & N. Dec. 298, 301.

<sup>88</sup> See *id.* at 298, 301.

<sup>89</sup> See *id.* at 299-302.

<sup>90</sup> See *id.* at 300; 8 C.F.R. § 208.18(a)(5).

are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.”<sup>91</sup> Therefore, the prison conditions were not “specifically intended” to bring about severe pain or suffering.<sup>92</sup>

The Board further determined that Haitian prison conditions were the result of “budgetary and management problems.”<sup>93</sup> The Board supported this conclusion by noting that “the Haitian Government ‘freely permitted the ICRC [International Committee of the Red Cross], the Haitian Red Cross, MICAH [International Civilian Mission for Support in Haiti], and other human rights groups to enter prisons and police stations, monitor conditions, and assist prisoners with medical care, food, and legal aid.’”<sup>94</sup>

## 2. *Dissenting opinions of In re J-E-*

The dissenting opinion of Paul Wickham Schmidt, joined by four other members, criticized the majority opinion’s separate analysis of indefinite detention, prison conditions, and police mistreatment.<sup>95</sup> According to the dissent, “[i]n essence, the majority errs by looking at the various factors that contribute to the abuse of Haitian returnees in isolation, and not as a whole.”<sup>96</sup> The Wickham dissent also implied that to satisfy the intent requirement, the Haitian government need only intentionally detain the deportees with knowledge of what will happen in the deplorable prison conditions.<sup>97</sup> The dissent further stated, “[t]hese authorities have continued the policy of detaining returnees with the *full knowledge* . . . that returnees will be forced to endure horrific prison conditions as well as starvation, beatings, and other forms of physical abuse.”<sup>98</sup> To further illustrate, the dissent supported its claim that Haitian prison conditions fall within the meaning of 8 C.F.R. § 208.18(a)(1) by

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<sup>91</sup> *In re J-E-*, 23 I. & N. Dec. at 301.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 301.

<sup>95</sup> See *supra* Part IV.A.1.

<sup>96</sup> *In re J-E-*, 23 I. & N. Dec. at 309.

<sup>97</sup> See *id.* at 307-08.

<sup>98</sup> *Id.* at 307 (emphasis added).

noting that, “[t]he Government of Haiti cannot claim that it does not *know* what happens to detainees in its prisons.”<sup>99</sup>

The dissenting opinion of Lory Rosenberg also opposed the majority’s interpretation of the phrase “specifically intended.”<sup>100</sup> According to the Rosenberg dissent, the phrase “specifically intended” does not impose a specific intent requirement as the term is used in criminal law. The Rosenberg dissent asserted that 8 C.F.R. § 208.18(a)(5) “reflects only that something more than an accidental consequence is necessary to establish the probability of torture.”<sup>101</sup> It pointed out the difficulties in ascertaining the subjective intent of any individual, as reflected in the various standards of proof for different areas of law such as criminal law, torts, and statutory civil rights.<sup>102</sup> The imposition of a specific intent requirement, according to the Rosenberg dissent, would make it “difficult, if not impossible, to prove specific intent in a prospective context.”<sup>103</sup>

Since the *In re J-E-* decision, it has served as a foundation for the analysis of the intent requirement for Withholding of Removal under CAT.<sup>104</sup> While some of the holdings of *In re J-E-* have been repudiated,<sup>105</sup> the central holding on the regulatory intent requirement for acts constituting torture has been followed<sup>106</sup> with only a few exceptions.<sup>107</sup>

## B. Third Circuit Interpretations

### 1. *Zubeda v. Ashcroft*

In *Zubeda v. Ashcroft*, the Court reviewed the decision of the BIA, reversing an Immigration Judge’s grant of CAT relief to Takky Zubeda. Zubeda testified that she and her family were raped in her home country, the Democratic Republic of

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<sup>99</sup> *Id.* at 308 (emphasis added).

<sup>100</sup> *Id.* at 316.

<sup>101</sup> *Id.*

<sup>102</sup> *In re J-E-*, 23 I. & N. Dec. at 316.

<sup>103</sup> *Id.*

<sup>104</sup> See *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003); *Thelemaque v. Ashcroft*, 363 F. Supp. 2d 198 (D. Conn. 2005).

<sup>105</sup> See generally *Khouzam*, 361 F.3d 161.

<sup>106</sup> See generally *Auguste*, 395 F.3d 123; *Thelemaque*, 363 F. Supp. 2d 198.

<sup>107</sup> See, e.g., *Zubeda*, 333 F.3d at 463.



Congo.<sup>108</sup> The Court vacated the BIA's opinion and remanded the case to the Immigration Judge.<sup>109</sup> The Court criticized the BIA's decision for a number of deficiencies. For example, the Court took strong exception to the determination of the likelihood of torture<sup>110</sup> and the BIA's analysis of country reports.<sup>111</sup> However, the Court never criticized the BIA's interpretation of the intent necessary for CAT relief.

Nevertheless, the Court dedicated a substantial portion of the opinion to an interpretation of the regulations' provision that an act must be "specifically intended."<sup>112</sup> Beginning its analysis, the Court stated explicitly, "[a]lthough the regulations require that severe pain or suffering be intentionally inflicted, we do not interpret this as a specific intent requirement. Rather, we conclude that the Convention simply excludes severe pain or suffering that is the unintended consequence of an intentional act."<sup>113</sup> The Court supported this interpretation by noting that the threat of severe physical pain or suffering amounts to torture.<sup>114</sup> The Court reasoned that such a provision demonstrates that "the Convention does not require that the persecutor actually intend to cause the threatened result. It is sufficient if the persecutor causes severe psychological suffering by threatening beatings for one of the specified purposes such as extracting information or coercing a confession."<sup>115</sup> According to the Court, an applicant seeking CAT relief need only show that the persecutor would cause severe suffering for a specified purpose to satisfy the intent element set forth in the regulations. Finally, the Court supported its interpretation on a pragmatic level noting that to require "an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the com-

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<sup>108</sup> *See id.* at 467.

<sup>109</sup> *See id.* at 480.

<sup>110</sup> *See id.* at 475 n.13. ("The BIA's reference to isolated instances of mistreatment is both puzzling and troubling. The relevant reports here describe mistreatment in the DRC as systematic and large scale, not isolated instances as the BIA suggests."). *Id.*

<sup>111</sup> *See Zubeda*, 333 F.3d at 475.

<sup>112</sup> 8 C.F.R. § 208.18(a)(5).

<sup>113</sup> *Zubeda*, 333 F.3d at 473 (internal quotations and citations omitted).

<sup>114</sup> *Id.* at 474.

<sup>115</sup> *Id.*

munity of nations sought to guarantee under the Convention Against Torture.”<sup>116</sup>

Although this interpretation stands in stark contrast to the BIA’s specific intent requirement announced in *In re J-E*,<sup>117</sup> the Court never addressed the inconsistency in its discussion on the requisite intent. While the Court discussed and set forth a standard of intent for CAT relief, the Court’s decision did not necessarily depend on it.

## 2. *Auguste v. Ridge*

Conversely, the Third Circuit, in *Auguste v. Ridge*, directly addressed the requisite intent for Withholding of Removal under CAT.<sup>118</sup> *Auguste* involved the petition for Deferral of Removal by a Haitian national claiming that the deplorable conditions and indefinite detention policy in Haiti amount to the regulatory definition of torture.<sup>119</sup> In contrast to its previous decision in *Zubeda*, the Court concluded that implementing the regulations of the Convention against Torture requires a showing of specific intent for an act to be considered “torture.”<sup>120</sup>

The Court in *Auguste* relied primarily on the ratification history of the Convention against Torture.<sup>121</sup> The Court cited a cover letter from the Assistant Secretary, Legislative Affairs, Department of State to the Chairman of the Senate Committee on Foreign Relations, which stated that the understanding reflects the Department of State’s position that specific intent is required for an act to constitute torture.<sup>122</sup> The Court supported its conclusion that the phrase “specifically intended” amounts to a specific intent requirement by noting that the “term ‘specific intent’ by its ordinary usage in American law as the ‘intent to accomplish the precise criminal act that one is later charged with.’”<sup>123</sup> *Auguste* argued that requisite intent

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<sup>116</sup> *Zubeda*, 333 F.3d at 474; see also Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1210 (1994) (internal quotations and citations omitted).

<sup>117</sup> *In re J-E*, 23 I. & N. Dec. 291, 301 (BIA 2002).

<sup>118</sup> See *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005).

<sup>119</sup> See *id.* at 129.

<sup>120</sup> See *id.* at 123.

<sup>121</sup> See *id.* at 139.

<sup>122</sup> *Id.* at 131 n.3.

<sup>123</sup> *Auguste*, 395 F.3d at 139 (quoting *In re J-E*, 23 I. & N. Dec. 291, 301 (BIA 2002)).

can be satisfied as long as the actor had knowledge that his actions might cause severe pain or suffering. The Court rejected this argument on the grounds that both the President and the Senate understood that the definition of torture included a specific intent requirement.<sup>124</sup> Therefore, the Court was "obliged to give that understanding effect."<sup>125</sup> Finally, the Court explained,

[w]e also believe it to be telling that both Presidents Reagan and Bush submitted the condition interpreting Article 1 with the 'specifically intended' language as an understanding, and not as a reservation or declaration. This suggests to us that the commonly understood meaning at the time of ratification was that, at least to the United States, the specific intent standard was consistent with a reasonable interpretation of the language in Article 1.<sup>126</sup>

As a result, the Court found that mere knowledge that one's deliberate actions will result in severe pain and suffering did not satisfy the requisite intent under the regulatory definition of torture.<sup>127</sup> Rather, one must "expressly intend to achieve the forbidden act."<sup>128</sup> After determining the legal issues, the Court applied the law to the facts. The Court concluded that there was no evidence that the Haitian authorities placed detainees in deplorable conditions to inflict severe pain and suffering and denied Auguste's petition.<sup>129</sup>

### 3. *Lavira v. Attorney General of the U.S.*

In subsequent cases, the Third Circuit faithfully followed the *Auguste* precedent on specific intent.<sup>130</sup> Then, in *Lavira v. Attorney General of the U.S.*, the Court was forced to apply the specific intent standard to a case brought by a disabled, HIV-positive criminal deportee from Haiti. In the end, the Court remanded the case so that the Immigration Judge ("IJ") could re-

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<sup>124</sup> *Id.* at 142.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 125.

<sup>127</sup> *See id.* at 148.

<sup>128</sup> *Id.* at 145.

<sup>129</sup> *See Auguste*, 395 F.3d at 153-54.

<sup>130</sup> *See generally*, e.g., *Toussaint v. Attorney General*, 455 F.3d 409 (3d Cir. 2006); *Francois*, 448 F.3d 645; *Auguste*, 395 F.3d 123; *Thelemaque*, 363 F. Supp. 2d 198.

examine several issues.<sup>131</sup> In this Comment, the analysis of *Lavira* will focus exclusively on the holding addressing the specific intent doctrine.<sup>132</sup>

Maurice Lavira is an HIV-positive, above-the-knee amputee<sup>133</sup> convicted for purchasing drugs.<sup>134</sup> Michelle Karshan, an expert in the Haitian prison system, testified that Lavira, “would not receive any meaningful medical treatment,”<sup>135</sup> that “Lavira would face the exceptionally dire prospect of losing 30 pounds soon after being incarcerated,” and that “death would follow shortly after.”<sup>136</sup> Lavira argued that “to place him knowingly in the disease-infested Haitian facility is to intentionally subject him to severe pain and suffering, even death.” Lavira argued that “his obvious vulnerability and its nearly inevitable consequences. . . satisfy the requirement that the harm that awaits him is specifically intended.”<sup>137</sup> Yet, the Immigration Judge denied his claim for withholding of removal under the Convention of Torture and ordered him to be deported.<sup>138</sup> Attempting to follow the specific intent principle set forth in *Auguste*, the IJ stated:

To be sure the respondent does have certain disabilities, but there is no evidence that has been submitted other than evidence relating to the general overall deplorable conditions that could lead this Court to conclude that the respondent would be placed or detained upon this return to Haiti with an intent to inflict severe pain or suffering.<sup>139</sup>

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<sup>131</sup> *Lavira v. Att’y Gen. of the United States*, 478 F.3d 158, 172 (3d. Cir. 2007).

<sup>132</sup> The holding in *Lavira* addressed two other major issues. First, the Court had to decide whether Lavira’s crime constituted a particularly serious crime. *Lavira*, 478 F.3d at 172. Second, the court had to decide whether Lavira’s status as an HIV-positive amputee would make it “more likely than not” that Lavira would suffer at the hands of prison guards. *See id.* at 169. Incidentally, the facts set forth in this comment, *see infra* Part VI.B, are sufficient to prove that criminal deportees as a whole stand out more than the average prisoner in the Haitian National Penitentiary, and thus, it is more likely that they will suffer physical abuse by the Haitian prison guards.

<sup>133</sup> *Lavira*, 478 F.3d 158, 159.

<sup>134</sup> *Id.* at 158-59.

<sup>135</sup> *Id.* at 171.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 169.

<sup>138</sup> *Lavira*, 478 F.3d at 172.

<sup>139</sup> *Id.* at 164 (quoting the Immigration Judge).

The Board of Immigration Appeals affirmed the Immigration Judge's decision,<sup>140</sup> but the Third Circuit remanded the case based, in part, on its modification of the specific intent doctrine.<sup>141</sup> First, the Court reaffirmed that "poor prison conditions did not constitute torture because they were not specifically directed by officials towards him or intended by officials to cause severe pain and suffering."<sup>142</sup> Then, recognizing the difficulty in proving intent, the Court declared:

[D]emonstrating proof of intent is necessarily an inferential endeavor in nearly every case; we must draw conclusions about actors' mental states from the conduct of those actors. In the CAT setting, those inferences are based on reports of the current activity in the proposed country of removal and predictions about what results will befall an individual after removal . . . . [I]n this (the CAT claim) setting, the IJ must make predictions about future states of mind. The CAT's implementing regulations recognize these concerns . . . . As such, IJs must be careful given the predictive and thus necessarily speculative inquiry into intent.<sup>143</sup>

Accordingly, the Court announced that "intent can be proven through evidence of willful blindness," but *mere recklessness* could not satisfy the specific intent element under CAT.<sup>144</sup> The Court attempted to distinguish *Lavira* from other criminal deportees by exclaiming:

There is no dispute that the conditions are rife with disease and comparable to a 'slave ship.' Severe pain is not 'a' possible consequence that 'may result' from placing *Lavira* in the facility, it is the only plausible consequence given what Haitian officials know about their own facility.<sup>145</sup>

Nevertheless, it appears that the Court based its decision primarily on the fact that *Lavira*, if deported, would suffer in ways different from the general prison population. For example, in the section of the opinion distinguishing *Lavira* from *Auguste*, the Court stated, "[t]here was nothing about *Auguste's* physical or mental condition which set him apart from the peti-

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<sup>140</sup> *Id.*

<sup>141</sup> *See generally id.*

<sup>142</sup> *Id.* at 169.

<sup>143</sup> *Id.* at 171.

<sup>144</sup> *Lavira*, 478 F.3d at 171.

<sup>145</sup> *Id.* at 170.

tioner in *Matter of J-E-* or the general population incarcerated at the facility . . . .”<sup>146</sup> Even more illustrative is the Court’s characterization of Auguste’s claim: “Auguste’s claim failed because he was understood to be presenting a generalized claim against the Haitian facility no different from the matter presented in *Matter of J-E-*.”<sup>147</sup> In contrast, the Court described Lavira’s claim as an “individualized attack on his removal to Haiti.”<sup>148</sup>

### C. Interpretations by other Circuits

#### 1. *Cadet v. Bulger*

In *Cadet v. Bulger*, the Eleventh Circuit Court of Appeals reviewed a petition by Jean Neckson Cadet seeking relief under the Convention against Torture.<sup>149</sup> The Eleventh Circuit evaluated Cadet’s claim by separately analyzing Haiti’s policy of indefinite detention, inhumane prison conditions, and police brutality, much in the same way that the Board of Immigration Appeals did in *In re J-E-*.<sup>150</sup> Additionally, the Court took the same position as the Third Circuit did in *Auguste*,<sup>151</sup> denying Cadet’s claim on the grounds that neither Haiti’s policy of indefinite detention, nor the inhumane prison conditions, nor the “isolated” instances of police brutality constituted torture because none of them were created or maintained for the purpose of bringing about severe pain or suffering.<sup>152</sup>

The Court’s reasoning in *Cadet* focused primarily on *In re J-E-*.<sup>153</sup> The Court declared: “In light of . . . our required *Chevron* deference, we cannot say that the distinction drawn by the BIA and legal conclusions in *J-E-* are arbitrary, capricious, or unreasonable.”<sup>154</sup> Indeed, the Court agreed with many of the

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<sup>146</sup> *Id.* at 168.

<sup>147</sup> *Id.* at 169.

<sup>148</sup> *Id.* at 172.

<sup>149</sup> *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004).

<sup>150</sup> Compare *Cadet v. Bulger*, 377 F.3d 1173, 1179-90 (11th Cir. 2004), with *In re J-E-*, 23 I. & N. Dec. 291, 299-302 (BIA 2002).

<sup>151</sup> Compare *Cadet*, 377 F.3d 1173, with *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005).

<sup>152</sup> *Cadet*, 377 F.3d at 1191.

<sup>153</sup> See *id.* at 1191-95.

<sup>154</sup> *Id.* at 1195.

BIA's findings.<sup>155</sup> While the Court took great care to compare *In re J-E-* and this case,<sup>156</sup> the Court neglected to include a discussion regarding the grounds for applying a specific intent standard.<sup>157</sup>

#### D. *Predominant Interpretation and its Analytical Framework*

Notwithstanding the dissent in *In re J-E-*, the *Zubeda* decision, and the suggestion in *Habtemicael*,<sup>158</sup> the BIA and many circuit courts read 8 C.F.R. § 208.18(a)(1) and § 208.18(a)(5) to mean that a persecutor must intend to bring about severe pain and suffering, not merely foresee that his deliberate actions will result in severe pain or suffering.<sup>159</sup> As a result, those seeking Withholding of Removal under the Convention against Torture must prove that those who would torture them would do so for the purpose of causing severe pain and suffering.

Supporters of a specific intent requirement rely heavily on the Senate's understandings and ratifying documents which express the Executive's and the Senate's interpretation of the phrases "intentionally inflicted"<sup>160</sup> and "specifically intended."<sup>161</sup> For example, the Court in *Auguste*, citing the legislative history of the treaty, stated:

Thus, we are presented with a situation where both the President and the Senate, the two institutions of the federal government with treaty-making process [sic], agreed during the ratification stage that their understanding of the definition of torture contained in Article 1 of the Convention included a specific intent requirement. In our view, this is enough to require that the understanding accompanying the United States' [sic] ratifica-

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<sup>155</sup> See *id.* at 1194.

<sup>156</sup> *Id.* at 1190-95.

<sup>157</sup> See *id.* at 1185. Instead of reviewing the validity of the specific intent standard, the Court briefly discussed the "Chevron" deference. *Id.*

<sup>158</sup> *Habtemicael v. Ashcroft*, 370 F.3d 774, 782 (8th Cir. 2004) (stating that the specific intent "requirement is satisfied if prolonged mental pain or suffering either is purposefully inflicted or is the foreseeable consequence of a deliberate act.").

<sup>159</sup> See *Francois v. Gonzales*, 448 F.3d 645, 651 (3d Cir. 2006) (relying on *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005); *Auguste*, 395 F.3d at 148 (dismissing *Zubeda*'s discussion supporting the general intent standard as dicta); *Cadet*, 377 F.3d at 1191; *In re J-E-*, 23 I. & N. Dec. 291, 301 (BIA 2002).

<sup>160</sup> 8 C.F.R. § 208.18(a)(1).

<sup>161</sup> 8 C.F.R. § 208.18(a)(5).

tion of the Convention be given domestic legal effect, regardless of any contention that the understanding may be invalid under international norms governing the formation of treaties or the terms of the Convention itself.<sup>162</sup>

Similarly, the BIA in *In re J-E-* cited a Committee on Foreign Relations Report, which states:

Further, the requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. *Because specific intent* is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention.<sup>163</sup>

As *Auguste* controls the Third Circuit cases, and not *Zubeda*, specific intent is the standard adopted by most courts.<sup>164</sup> The analytical framework, used by the court in *Auguste*, has two main components. First, the framework used by the Court does not give a rebuttable presumption that a persecutor intended the natural and probable consequences of the persecutor's deliberate actions.<sup>165</sup> Second, the framework analyzes indefinite detention, deplorable prison conditions, and police brutality separately.

### 1. *The Lavira Contradiction*

The only way to reconcile the *Auguste* and *Lavira*<sup>166</sup> decisions regarding specific intent in the context of prison conditions requires the following: the specific intent standard is *not* met when a persecutor intends a certain action but does not intend the reasonably foreseeable consequences of the action

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<sup>162</sup> *Auguste*, 395 F.3d at 143.

<sup>163</sup> REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. EXEC. DOC. NO. 30, at 14 (1990).

<sup>164</sup> See *Francois*, 448 F.3d at 651 (relying on *Auguste*, 395 F.3d 123); *Auguste*, 395 F.3d at 148 (dismissing *Zubeda*'s discussion supporting the general intent standard as dicta); *Cadet*, 377 F.3d at 1191; *In re J-E-*, 23 I. & N. Dec. at 301.

<sup>165</sup> See *Auguste*, 395 F.3d at 123.

<sup>166</sup> Indeed, it is impossible to reconcile *Lavira* and *In re J-E-* as the Board in *In re J-E-* stated explicitly: "Although Haitian authorities are intentionally detaining criminal deportees *knowing* that the detention facilities are substandard, there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture." *In re J-E-*, 23 I. & N. Dec. at 301.



which results in severe pain and suffering.<sup>167</sup> However, the specific intent standard is satisfied when "severe pain is not 'a' possible consequence that 'may result' from . . ." <sup>168</sup> a particular action, but rather, ". . . it is the only plausible consequence given what . . ." <sup>169</sup> the persecutor knows. In other words, the persecutor is deliberately ignorant or willfully blind. While this reconciliation is true to the normal definitions of specific intent in a criminal law context, it ignores the facts. Although *Lavira's* prospective harm was greater in degree than *Auguste's*, *Toussaint's* and *Francois's*, it was no more inevitable. By placing the criminal deportees in deplorable prison conditions indefinitely, all criminal deportees are guaranteed to endure severe pain and suffering due to starvation, crowded facilities, violence, and general prejudice from the community. Therefore, the doctrine of willful blindness applies exactly the same way to healthy and disabled criminal deportees. Indeed the Board in *In re J-E-* admitted that Haitian officials had knowledge of the consequences of their actions, but the Board denied the claim because the authorities did not intend to inflict severe pain and suffering.<sup>170</sup>

## VI. ANALYSIS AND RECOMMENDATIONS

### A. *Specific Intent and General Intent*

#### 1. *Argument for adopting a General Intent Standard*

While the original text of the Convention against Torture states that torture need only be "intentionally inflicted,"<sup>171</sup> the U.S. signed the treaty with the understanding that the phrase "intentionally inflicted" meant "specifically intended."<sup>172</sup> Although other signatories to the Convention against Torture objected,<sup>173</sup> the Senate and both Presidents Reagan and Bush signed the convention with the understanding that specific intent was required.<sup>174</sup>

<sup>167</sup> *Auguste*, 395 F.3d at 147.

<sup>168</sup> *Lavira v. Att'y Gen. of the United States*, 478 F.3d 158, 170 (3d Cir. 2007).

<sup>169</sup> *Id.*

<sup>170</sup> *In re J-E-*, 23 I. & N. Dec. at 301.

<sup>171</sup> Convention against Torture, *supra* note 3, art. 1.

<sup>172</sup> *Id.*, Declarations and Reservations of the U.S.

<sup>173</sup> *Id.*, Objections of the Netherlands.

<sup>174</sup> See *Auguste v. Ridge*, 395 F.3d 123, 143 (3d Cir. 2005).

The specific intent requirement creates an unnecessarily high burden on an applicant and is, therefore, inconsistent with the purpose of the Convention against Torture. Both the Committee on Foreign Relations Report<sup>175</sup> and 8 C.F.R. § 208.18 (a)(5) state that the requisite standard of intent serves to exclude from the regulatory definition of torture acts that result in unanticipated or unintended pain and suffering. If the purpose of the intent requirement is simply to exclude from the definition of torture acts that result in unanticipated suffering, the specific intent requirement does so, but in the process excludes many other torturous acts.

For example, the specific intent standard will not be met in situations where the persecutor reasonably foresees that his actions will cause extreme pain or suffering, as long as some non-sadistic consideration, such as national security, motivated the persecutor. The Court in *Auguste* stated this proposition explicitly. “[I]f the actor intended the act but did not intend the consequences of the act, i.e., the infliction of severe pain and suffering, *although such pain and suffering may have been a foreseeable consequence*, the specific intent standard would not be satisfied.”<sup>176</sup> Finally, imposing a specific intent requirement, and thereby unnecessarily narrowing the definition of torture, would abrogate the very purpose of the Senate’s ratification, “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”<sup>177</sup> While the Senate understood the treaty to impose a specific intent standard, the court need not impose a standard that effectively undercuts the purpose for which the Senate ratified the treaty.

Moreover, a general intent standard would more accurately implement the Senate’s purpose for the intent element, excluding unanticipated pain and suffering, because “causing a prohibited result through accident, mistake, carelessness, or absent-mindedness”<sup>178</sup> does not satisfy the general intent standard. A general intent standard would also more effectively

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<sup>175</sup> REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, S. EXEC. DOC. NO. 30, at 14 (1990).

<sup>176</sup> *Auguste*, 395 F.3d at 147 (emphasis added).

<sup>177</sup> Convention against Torture, *supra* note 3, pmb1.

<sup>178</sup> 21 AM. JUR. 2D *Criminal Law* § 127 (2006).

achieve the purpose of the entire treaty, "to make more effective the struggle against torture and other cruel, inhumane or degrading treatment or punishment throughout the world,"<sup>179</sup> by expanding the definition of torture and thereby offering relief to more people who suffer cruel and inhumane punishment. Accordingly, circuits that have not directly ruled on the statutory definition of torture should follow *Zubeda*, the dissent in *In re J-E-*, and *Habtemicael*, and interpret 8 C.F.R. § 208.18(a)(1) and § 208.18(a)(5) to impose a general intent standard.

## 2. *New Framework for Specific Intent Analysis*

Even if a court concludes that specific intent, as understood in American criminal law, is the requisite standard, the court should not use the same analytical framework used in *Auguste* and *In re J-E-*. First, the courts in those cases did not apply the specific intent standard as it is commonly understood in American criminal law. Typically, the court, in a criminal proceeding, will presume that a person intends all the natural and probable consequences of their actions, regardless of whether it is a specific or general intent crime.<sup>180</sup> The Courts in *Auguste* and *In re J-E-* never afforded the Petitioners the benefit of such a presumption.<sup>181</sup> The Court in *Auguste* stated, "if the actor intended the act but did not intend the consequences of the act, i.e., the infliction of severe pain and suffering, *although such pain and suffering may have been a foreseeable consequence*, the specific intent standard would not be satisfied."<sup>182</sup> This reasoning does not accurately reflect specific intent, as it is commonly understood in criminal law because when a result is a foreseeable consequence (i.e. the result is the natural and probable consequence of an action) a court will presume that the actor intended such a result, unless there is some other evidence to the contrary.<sup>183</sup> While there may be some debate as to whether there was evidence to the contrary, the Courts in *Auguste* and *In re J-E-* failed to use, or even mention, the typical analysis

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<sup>179</sup> Convention against Torture, *supra* note 3, pmbl.

<sup>180</sup> See 22 C.J.S. *Criminal Law* § 43 (2006); see also *Laws v. United States*, 66 F.2d 870, 872 (10th Cir. 1933).

<sup>181</sup> See generally *Auguste*, 395 F.3d 123; *In re J-E-*, 23 I. & N. Dec. 291 (BIA 2002).

<sup>182</sup> *Auguste*, 395 F.3d at 146 (emphasis added).

<sup>183</sup> See *McDonald v. United States*, 9 F.2d 506, 508 (8th Cir. 1925).

used in criminal cases. Accordingly, this Comment asserts that the natural and probable consequences of a persecutor's actions which result in torture should give rise to a rebuttable presumption that the persecutor intended the result of his voluntary actions because this is the "ordinary usage [of specific intent] in American law."<sup>184</sup> This analysis is superior to the analysis in *Auguste* and *In re J-E-* for two reasons. First, and most importantly, it more accurately reflects the meaning of specific intent as it is understood in criminal law. Second, when torture results from the natural and probable consequences of a deliberate act, the *government*, not the alien, would have to provide evidence that the persecutor did not specifically intend the torturous results. This analysis is preferable because the government has the resources to do the complex investigation required to prove the intent of a persecutor located thousands of miles away.

In addition, the Courts in *Auguste* and *In re J-E-* separately analyzed Haiti's indefinite detention policy, the inhumane conditions, and police brutality. This type of analysis inadequately attempts to isolate the legal issues, but in the process, distorts the reality of conditions in Haitian prisons. An independent analysis of indefinite detention does not capture the essence of Haitian prison conditions. The horrific nature of Haitian prison conditions is due in part to the fact that indefinite detention occurs, not in a jail cell with running water and enough food for the inmates, but in a squalid jail cell with forty other inmates and with the only prospect of release being a bribe to the prison officials or a family member sponsorship. Therefore, this Comment recommends that the BIA and the Circuit Courts of Appeals, first, allow a rebuttable presumption of specific intent when torture is the natural and probable consequence of the persecutor's deliberate actions. Second, the courts should analyze the Haitian prison system as a whole to determine whether the system causes "torture."

#### B. *Haitian Prison Conditions and Specific Intent*

The Board of Immigration Appeals and the Third Circuit have chronicled the conditions of the Haitian prison system.

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<sup>184</sup> *Auguste*, 395 F.3d at 139 (quoting *In re J-E-*, 23 I. & N. Dec. at 301).

Both the BIA and the Third Circuit had evidence that criminal deportees from the United States are routinely held indefinitely in Haitian prisons<sup>185</sup> with other prisoners in the National Penitentiary.<sup>186</sup> The Court in *Francois* had evidence that a deportee may be released within three months if a close family member agrees, in writing, to turn them self in to be arrested if the deportee commits a crime and is not apprehended.<sup>187</sup> The Court in *Toussaint* also had evidence that bribery can secure the release of deportees. The Court in *Auguste* gave a thorough description of the squalid conditions in which Haitian criminal deportees are held indefinitely.<sup>188</sup> The court noted that the cells are so overcrowded that prisoners must sleep sitting or standing up, and that roaches, rats, mice and lizards infest the cells.<sup>189</sup> The bags in which prisoners must defecate remain uncollected for days and often spill onto the floor.<sup>190</sup> The Court further observed that "malnutrition and starvation is a continuous problem."<sup>191</sup> In addition, the Court discussed reports of prison guards abusing inmates using tactics such as electric shock, burning with cigarettes, and choking.<sup>192</sup>

Although the Courts appeared to have had a clear picture of the Haitian prison system, they lacked one crucial piece of evidence: the widespread hatred of criminal deportees from the United States, and Americanized Haitians in general. In this Comment, I hope to show new facts which will demonstrate that the Haitian authorities, due to an unreasonable fear of criminal deportees from the United States, place Americanized criminal deportees into the prison system for the specific purpose of causing severe pain and suffering on those criminal deportees, thereby distinguishing future cases from *In re J-E*, *Auguste*, *Toussaint*, and *Francois*. Although the Courts did not have the luxury of such evidence of the widespread hatred of criminal deportees in Haiti, the phenomenon is well documented.

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<sup>185</sup> *Auguste*, 395 F.3d at 129; *In re J-E*, 23 I. & N. Dec. at 293.

<sup>186</sup> *Francois v. Gonzales*, 448 F.3d 645, 650 (3d Cir. 2006).

<sup>187</sup> *Id.* at 650-51.

<sup>188</sup> *Auguste*, 395 F.3d at 129.

<sup>189</sup> *Id.* at 129.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

For example, The Office of the United Nations High Commissioner for Human Rights reports that “there is great hostility towards deportees.”<sup>193</sup> Similarly, the International Crisis Group described deportees from the United States as “society’s outcasts.”<sup>194</sup> A local Florida newspaper reported that American criminal deportees even have trouble finding work, in part, due to “the stigma of deportation.”<sup>195</sup> In addition, deportees are often the target of violence and persecution simply because they were deported from the U.S.<sup>196</sup>

Alternative Chance, a non-profit organization headed by expert Michelle Karshan, who testified in *Lavira*, documented some of the stories which illustrate the country-wide discrimination against criminal deportees:

Max (from Miami), Marc (aka “Gambino” from New York), and Patrick (from New York). A police officer living in the same neighborhood as Marc had a grudge against him because he was a Criminal Deportee and had a car and money. The police and one of the three men got into a fight in front of Munchies, a restaurant in Petionville which is famous for carnival activities held in front of the restaurant on some Sundays. The three deportees ran but were later fingered by that one police officer and were arrested in Petionville but were taken to the Thomassin 25 police station in a suburb far above Petionville for the express purpose of beating and torturing them. The three Criminal Deportees were severely beaten and tortured by police. According to a [sic] eyewitness, a few days later the police took the three Criminal Deportees out of the police station and executed them. Marc’s mother in New York was said to have had a stroke as a result of learning of her son’s execution.<sup>197</sup>

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<sup>193</sup> Independent Expert, *Situation of Human Rights in Haiti*, ¶ 33, U.N. DOC. E/CN.4/2006/115 (Jan. 24, 2006), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=47](http://ap.ohchr.org/documents/dpage_e.aspx?m=47) (follow “Report of the Independent expert on the situation of human rights in Haiti, Lois Joinet” hyperlink).

<sup>194</sup> Crisis Group Latin America/Caribbean Report, *Spoiling Security in Haiti*, at 7 (2005), available at <http://www.crisisgroup.org/home/index.cfm?id=3485>.

<sup>195</sup> Ruth Morris, *For Haitian deportees, American-style ‘grills’ mark them as targets for violence, hate*, S. FLA. SUN-SENTINEL, Dec. 29, 2006, available at <http://www.alternativechance.org> (follow “For Haitian deportees, American-style ‘grills’ mark them as targets for violence, hate” hyperlink).

<sup>196</sup> See *id.*

<sup>197</sup> Michelle Karshan, *Preliminary Reports by Michelle Karshan on Police Executions and Torture of Criminal Deportees in Haiti 2004-2006*, Oct. 23, 2006, available at <http://www.alternativechance.org> (follow “Articles about Deportation

Alternative Chance documented numerous other abuses, as well. Ultimately, the widespread xenophobia towards criminal deportees resulted in outlandish accusations by the Haitian government.

For instance, the Inter-American Commission on Human Rights reported that *government officials* suspect the criminal deportees of “masterminding the wave of kidnappings in Haiti and to be involved in drug trafficking and the arms trade, based upon the experience that they have gained from their criminal activities in other countries.”<sup>198</sup> Based on these unsubstantiated accusations, the Haitian government claims that the detention of criminal deportees is for security purposes, yet “Haiti’s government doesn’t track how many crimes are committed by people who have been deported.”<sup>199</sup> Moreover, “no hard evidence exists to suggest they [criminal deportees] significantly affect crime in Haiti.”<sup>200</sup> Indeed, many Haitians have called on the government to substantiate their claims that criminal deportees from the United States are causing chaos in Haiti, but the Haitian government has yet to substantiate their claim.<sup>201</sup>

The Third Circuit, in *Auguste*, carefully explained that, “. . . if there is evidence that authorities are placing an individual in such conditions with the intent to inflict severe pain and suffering on that individual, such an act may rise to the level of torture should the other requirements of the Convention be met.”<sup>202</sup> The facts set forth above demonstrate that Haitian authorities place criminal deportees in horrid prison conditions

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to Haiti, Alternative Chance, and Criminal Deportation in general” hyperlink; then follow “Preliminary Report by Michelle Karshan on Police Executions & Torture of Criminal Deportees in Haiti 2004-2006” hyperlink).

<sup>198</sup> General Secretariat, *Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti and the International Community*, ¶ 211, OEA/Ser/L/V/II. 123 doc. 6 rev 1 (Oct. 26, 2005), available at <http://www.cidh.org/countryrep/HAITI%20ENGLISH7X10%20FINAL.pdf> [hereinafter “General Secretariat Report”].

<sup>199</sup> Associated Press, *U.S. lawmakers says deportees not fueling crime in Haiti*, HAITI NEWS, Dec. 11, 2006, available at <http://haitinews.wordpress.com/2006/12/13/us-lawmaker-says-deportees-not-fueling-crime-in-haiti/>.

<sup>200</sup> *Id.*

<sup>201</sup> Amy Bracken, *Influx of Deportees Stirs Anger in Haiti: Some Believe US Policy Helped Boost Crime Rate*, THE BOSTON GLOBE, Mar. 11, 2007, at A6, available at [http://www.boston.com/news/world/latinamerica/articles/2007/03/11/influx\\_of\\_deportees\\_stirs\\_anger\\_in\\_haiti/?page=full](http://www.boston.com/news/world/latinamerica/articles/2007/03/11/influx_of_deportees_stirs_anger_in_haiti/?page=full).

<sup>202</sup> *Auguste v. Ridge*, 395 F.3d 123, 154 (3d Cir. 2005).

“with the intent to inflict severe pain and suffering”<sup>203</sup> due to the widespread hatred of Haitian criminal deportees. Thus, Haitian prison conditions satisfy the regulatory definition of “torture” for claims of withholding of removal under the CAT. The new facts set forth above also make clear that the policy of indefinite detention is not merely a “preventative measure to prevent returning criminals from further exacerbating the country’s already high levels of crime;”<sup>204</sup> neither are they to “deter criminal activity in Haiti.” These facts also contravene the Third Circuit’s conclusion that CAT claims by Haitian criminal deportees are merely bemoaning . . . “the general state of affairs that constitute[s] conditions of confinement’ in Haiti.”<sup>205</sup> Rather, these policies, intended to punish, intimidate, and coerce criminal deportees,<sup>206</sup> were crafted specifically to target criminal deportees from the United States. This fact belies any assertion that pain and suffering will not be “directed at ‘a particular petitioner.’”<sup>207</sup> Finally, even if non-criminal deportees suffer in the same prison conditions as criminal deportees, or Haitian authorities do not create or maintain the entire prison system for the purpose of torturing criminal deportees, the specific intent standard is still met because the policies which keep criminal deportees in inhumane conditions for unreasonably long periods of time were created specifically to cause severe pain and suffering to criminal deportees.

### CONCLUSION

While some courts have interpreted the “intentionally inflicted” requirement of 8 C.F.R. § 208.18 8(a)(1) to impose a specific intent standard, general intent should satisfy the “intentionally inflicted” requirement of 8 C.F.R. § 208.18 8(a)(1) for several reasons. First, the requisite intent was meant to exclude from the regulatory definition of torture deliberate acts that resulted in unanticipated or unintended pain and suffering. A general intent standard would effectively serve that pur-

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<sup>203</sup> *Id.*

<sup>204</sup> *Francois v. Gonzales*, 448 F.3d 645, 650 (3d Cir. 2006).

<sup>205</sup> *Toissaint v. Att’y Gen. of the United States*, 455 F.3d 409, 416 (3d Cir. 2006) (quoting *Auguste*, 395 F.3d at 137).

<sup>206</sup> *In re J-E-*, 23 I. & N. Dec. 291, 298 (BIA 2002).

<sup>207</sup> *Toissaint*, 455 F.3d at 416 (quoting *Francois*, 448 F.3d at 652).



pose, while a specific intent standard will exclude even those deliberate acts committed by persecutors who foresee that their acts will result in torture. Second, a specific intent standard would disqualify almost every applicant<sup>208</sup> because any innocuous explanation for torture removes the conduct from the regulatory definition of torture.

Even if courts determine that the regulations require a specific intent standard, the courts should not apply it to Haitian deportees using the analytical framework the Court used in *Auguste* and *In re J-E*. Rather, the courts should afford the petitioner with a rebuttable presumption that the persecutor intends the natural and probable consequences of the persecutor's actions, and the courts should analyze the Haitian prison system as a whole.

Finally, the Haitian policies and nation-wide hostility towards criminal deportees demonstrate that under either the general intent standard or the specific intent standard, criminal deportees to Haiti will experience torture if returned to Haiti. Accordingly, they are eligible for Withholding of Removal under the Convention against Torture.

#### ADDENDUM

Just before the printing of this article, the Second and Eleventh Circuit Courts of Appeal decided cases in which the potential deportees suffered from some physical or mental infirmity.<sup>209</sup> However, rather than relying on the willful blindness rationale in *Lavira*, the courts reasoned that the specific intent standard could be met if there were sufficient evidence to show that the applicant's condition would cause the applicant to act inappropriately resulting in their being singled out for spe-

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<sup>208</sup> *In re J-E*, 23 I. & N. Dec. at 310-11.

I take issue with [the majority's approach], which I fear can only lead to a derogation and not a meaningful implementation of our obligations under the Convention Against Torture. Considering the limitations adopted by the majority in this case, I find it difficult to conceive of the circumstances in which an individual might qualify for our protection, as there will always be some basis for disqualification. *Id.* See also *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003) (stating "Moreover, requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.").

<sup>209</sup> See *Pierre v. Gonzales* 502 F.3d 109 (2d Cir. 2007); *Jean-Pierre v. U.S. Attorney General* 500 F.3d 1315 (11th Cir. 2007).

cial abuse by prison guards.<sup>210</sup> Indeed, the Second Circuit explicitly repudiated the reasoning in *Lavira*, stating, “[w]e do not see how these concepts [in *Lavira*], which may bear on knowledge to the extent they establish conscious avoidance, can without more demonstrate specific intent, which requires that the actor intend the actual consequences of his conduct (as distinguished from the act that causes these consequences).”<sup>211</sup> While these cases hold much promise for sick or disabled applicants, they fail to address two important issues. First, the Courts have still not reconciled its specific standard with the traditional criminal intent standard.<sup>212</sup> Second, the Courts have ignored the evidence that American criminal deportees are consistently singled out. The Eleventh Circuit even cited the expert testimony of Michelle Karshan, stating that “[c]riminal deportees from the United States are treated especially harshly, and that they are sometimes ‘beaten with metal wands because the prison guards perceive them to be professional criminals deserving of the punishment.’”<sup>213</sup>

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<sup>210</sup> *Pierre*, 502 F.3d at 122; *Jean-Pierre* 500 F.3d at 1323.

<sup>211</sup> *Pierre*, 502 F.3d at 118.

<sup>212</sup> See *supra* Part VI.A.2.

<sup>213</sup> See *Jean-Pierre*, 500 F.3d at 1319.